

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
COSDEN OIL COMPANY, INC.,
dba RESTOVER TRUCK STOP,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 85-111

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of a \$10,000 civil penalty assessed under RCW 90.48.350 for alleged discharge of oil into the ground water came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Chairman, and Wick Dufford, Lawyer Member, convened in Lacey, Washington, on October 15, 1985. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, Arthur L. Davies. Respondent appeared by Allen T. Miller, Jr., Assistant Attorney General.

1 Reporter Cheri L. Davidson reported the proceedings.

2 Witnesses were sworn and testified. Exhibits were examined. From
3 testimony heard and exhibits examined, the Pollution Control Hearings
4 Board makes these

5 FINDINGS OF FACT

6 I

7 Appellant, Cosden Oil Company, Inc., dba Restover Truck Stop
8 (Cosden) operates a gasoline and diesel fuel service station at the
9 Lathrop Road Exit on Interstate 5 south of Olympia. A restaurant and
10 motel are also located on the premises.

11 II

12 In 1976, respondent Department of Ecology (DOE) investigated
13 complaints of petroleum odor from well water at a residence close to
14 Cosden's site. Laboratory samples of the well were taken by DOE. So
15 were samples of storm water running off the blacktopped service area
16 of the Cosden site. A considerable quantity of petroleum was present
17 in the road ditch running between the Cosden site and the residence in
18 question. A memorandum issued by a DOE geologist in 1978 concluded
19 that the only smell in the residential well was directly related to
20 the waste water discharged by Cosden into the road ditch. During this
21 period, DOE requested Cosden to submit a plan to collect and treat
22 pump and truck spillage/leakage along the perimeter of its business.
23 Cosden did not submit such a plan.

24 III

25 In 1982, DOE received another complaint of petroleum odor in a

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-111

1 well at another residence further from the Cosden site. In the course
2 of investigating this complaint, DOE inspected the tanks used to store
3 motor fuel, and questioned Cosden personnel. On June 2, 1982, amidst
4 this investigation, Cosden personnel revealed to DOE that they had
5 recently repaired a leaking connector, on the underground line from
6 the leaded gas storage tank to the pumps. This had been leaking since
7 1974, a period of some six years. Although daily "stick readings" of
8 the tanks indicate that dramatic volumes of gas were not lost in this
9 fashion, nevertheless, we find that significant amounts of gasoline
10 did escape via this leak and enter the ground water.

11 IV

12 The Cosden service bay, where motor oil is changed, has been
13 cleaned by rinsing oil residue into sumps connected to a septic tank
14 and drainfield. We find that oil discharged in this manner entered
15 the ground water. The practice of rinsing oil residue into the septic
16 system has been discontinued by Cosden at DOE request. Oil residue is
17 now cleaned up with sorbent material.

18 V

19 Spillages have occurred during the delivery of motor fuel to the
20 storage tanks. However, these have not been shown to result in the
21 entry of oil into the ground water.

22 VI

23 In early January, 1984, Cosden personnel revealed to DOE that some
24 five years earlier an accident involving a fuel spill had occurred at
25 the service station. A logging truck was apparently maneuvering near
26

1 the fuel pumps when it collided with one of them. Gasoline spewed out
2 from the damaged pump onto the area around the pump islands. Cosden
3 personnel secured a valve on the fuel line to stop the escape of
4 gasoline, and it has not been shown that they used less than ordinary
5 care in doing so. The volume of gasoline spilled was from 1,000 to
6 2,000 gallons. The spill was immediately reported to the fire
7 department. Out of paramount concern for avoiding a fire, the fire
8 department washed the fuel down the storm drains. These led to a
9 septic tank and drainfield. We find that gasoline discharged in this
10 manner entered the ground water.

11 VII

12 On January 24, 1984, DOE issued to Cosden: 1) an Order (DE
13 83-102) requiring ground water clean up, and 2) a Notice of Penalty in
14 the amount of \$10,000 citing RCW 90.48.350. Cosden appealed both of
15 these to this Board. Appeal of the remedial order was subsequently
16 withdrawn. This matter is the appeal by Cosden, filed June 28, 1985,
17 from the Notice of Penalty. The Notice specifies the following
18 discharges of oil to the ground water.

- 19 1. Oil-contaminated water from the parking lot;
- 20 2. Petroleum from the septic tank and drainfield;
- 21 3. Petroleum spills during delivery to the underground storage
22 tanks;
- 23 4. An unreported oil spill in 1979.

24 VIII

25 Any Conclusion of Law which is deemed a Finding of Fact is hereby

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-111

1 adopted as such.

2 From these Findings of Fact the Board comes to these

3 CONCLUSIONS OF LAW

4 I

5 This is a penalty case brought under RCW 90.48.350 of the Water
6 Pollution Control Act which states in pertinent part:

7 Any person who intentionally or negligently
8 discharges oil, or causes or permits the entry of the
9 same, shall incur, in addition to any other penalty
10 as provided by law, a penalty in an amount of up to
11 twenty thousand dollars for every such violation, and
12 for each day of a continuing violation; said amount
13 to be determined by the director of the commission
14 after taking into consideration the gravity of the
15 violation, the previous record of the violator in
16 complying, or failing to comply, with the provisions
17 of chapter 90.48 RCW, and such other considerations
18 as the director deems appropriate. Every act of
19 commission or omission which procures, aids or abets
20 in the violation shall be considered a violation
21 under the provisions of this section and subject to
22 the penalty herein provided for....

23 The essential elements of this section are: 1) intentional or
24 negligent conduct, 2) causing, 3) entry of oil into waters of the
25 state. Atlantic Richfield Company v. Department of Ecology, PCHB No.
26 298 (1977), Northwest Airlines v. Department of Ecology, PCHB No. 77-9
27 (1977). "Oil" means oil, including gasoline, crude oil, fuel oil,
diesel oil, lubricating oil, sludge, oil refuse or any other petroleum
related product. RCW 90.48.315(8). "Waters of the state" means and
includes underground water. RCW 90.48.315(11).

II

The burden of proof in a penalty case, such as this one, is upon

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 85-111

1 the Department of Ecology (DOE).

2 III

3 The notice of penalty must be served by DOE within two years of
4 its discovery of the facts causing the notice to be issued (or within
5 two years of when such facts would be discovered by DOE using due
6 diligence). U.S. Oil v. Department of Ecology, 96 Wn.2d 85, 633 P.2d
7 1329 (1981). In this case, the facts pertinent to paragraph 1. of the
8 Notice, "Oil-Contaminated storm water from the parking lot" arose and
9 were discovered by DOE more than two years prior to service of the
10 Notice. (See Findings of Fact II and VII, above). Penalties based
11 upon these facts alone are therefore barred.

12 IV

13 The Notice of Penalty did not cite facts, offered at hearing,
14 relating to a motor fuel delivery line which was found to be leaking
15 gasoline. However, this was not objected to by appellant, which also
16 offered evidence on this occurrence. Under these circumstances we
17 deem the Notice amended to conform to the proof. (See Yakima Clean
18 Air v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975); and Texaco
19 v. Department of Ecology, PCHB No. 930 (1976) likening a notice of
20 penalty to a summons and complaint and CR 15(b) which is among the
21 court rules adopted by WAC 371-08-145 of our rules of procedure.)

22 V

23 By operating a motor fuel delivery line which leaked for some six
24 years, Cosden was negligent. This negligence caused oil to enter
25 waters of the state. By this action, Cosden violated RCW 90.48.350.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER
PCHB No. 85-111

VI

By regularly disposing of oil residue from its motor vehicle service bay into a septic system, Cosden was negligent. This negligence caused oil to enter waters of the state. By this action, Cosden violated RCW 90.48.350.

VII

It was not proven that spillage during delivery of motor fuel resulted in entry of oil into waters of the state in violation of RCW 90.48.350.

VIII

It was not proven that Cosden was negligent in the matter of the logging truck which collided with Cosden's gasoline pump. Nor was it proven that Cosden discharged, caused, permitted, allowed, aided or abetted that release of gasoline. Cosden therefore did not violate RCW 90.48.350 with regard to that event. Neither did Cosden breach the duty to report an oil spill under RCW 90.48.360 as that duty is imposed upon the person discharging oil or otherwise causing, permitting or allowing the same.

IX

It is not the function of a penalty to compensate the public for a tangible loss. The purpose is penal. See U. S. Oil above, at p. 90. The penal object, however, is not primarily retribution, but rather to influence the behavior of the perpetrator and to deter violations generally. Under RCW 90.48.350, the penalty must be fixed with regard to a) the gravity of the violation, b) the previous record of the

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW & ORDER
PCHB No. 85-111

1 violator in complying, or failing to comply, with provisions of 90.48
2 RCW and such other considerations as the director (of DOE) deems
3 appropriate. In this case, the level of penalty assessed by DOE,
4 \$10,000, was appropriate to the gravity of the violations alleged.
5 However, several of the violations alleged were not proven. The
6 penalty which is therefore commensurate with the violations proven,
7 giving consideration to the statutory formula, is \$2,500.

8 X

9 Any Finding of Fact which is deemed a Conclusion of Law is hereby
10 adopted as such.


11 From these Conclusions of Law the Board enters this
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ORDER

The Notice of Penalty and violations of RCW 90.58.350 as set forth above are affirmed. The penalty is abated to \$2,500.

DONE at Lacey, Washington, this 30th day of December, 1985.

POLLUTION CONTROL HEARINGS BOARD

 12/3/85
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member


WILLIAM A. HARRISON
Administrative Appeals Judge